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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/643,521	08/19/2003	Rolf W. Reisgies	034664-0141	4464

23524 7590 01/10/2007
FOLEY & LARDNER LLP
150 EAST GILMAN STREET
P.O. BOX 1497
MADISON, WI 53701-1497

EXAMINER

SMITH, KIMBERLY S

ART UNIT	PAPER NUMBER
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3644

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
2 MONTHS	01/10/2007	PAPER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/643,521
Filing Date: August 19, 2003
Appellant(s): REISGIES, ROLF W.

Paul S. Hunter
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 10/05/06 appealing from the Office action mailed 05/03/06.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is deficient. 37 CFR 41.37(c)(1)(v) requires the summary of claimed subject matter to include: (1) a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by page and line number, and to the drawing, if any, by reference characters and (2) for each independent claim involved in the appeal and for each dependent claim argued separately, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function must be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters. The brief is deficient because with respect to claims 11 and 12, the Appellant has directed the Board's attention to portions of the specification, which provide a basis for means plus function language. It must be noted that the Appellant in the prosecution of the instant application has not invoked 35 U.S.C. 112, sixth paragraph. MPEP 2181 states that a claim limitation will be presumed to invoke 35 U.S.C. 112, sixth paragraph, if it meets the 3-prong analysis. Claims 11 and 12 do not meet the third prong of this analysis, that being: *the phrase "means for" or "step for" must not be modified by sufficient structure, material or acts for achieving the specified function.* In both independent claims, the "means for adjustably mounting wheels to the carriage" has further been modified by acts for achieving the specified function, i.e. "so that the wheels can be moved up and down". As such, the summary of the claimed subject matter in the Appeal

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Brief should not be inclusive of the defined limited limitations with respect to 35 U.S.C. 112, sixth paragraph.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: Claims 16 and 18 are rejected as being unpatentable under 35 U.S.C. 103(a) over Ferris, US Patent 3,019,763 as modified in view of Smith, US Patent 4,250,836 in further view of van der Lely, US Patent 6,044,793.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

3,019,763	<u>FERRIS</u>	2-1962
4,250,836	<u>SMITH</u>	2-1981
6,044,793	van der LELY	4-2000

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 11-15 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ferris, US Patent 3,019,763 in view of Smith, US Patent 4,250,836.

Ferris discloses a modular milking parlor comprising a frame base (11), plurality of upright members (14, 15), at least one longitudinal support member (16) attached to the upright support members, wheels (17) and a plurality of milking stations (as seen in the figures) including a means for raising and lowering the platform to the ground for lessening the climb of the cows to the unit (column 3, lines 1-2). Ferris further discloses a plurality of wheeled carriages having a carriage body (i.e. the axle mechanism), which is detachable from the milking

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parlor frame (as it is well known in the art that axle mechanisms are detachable from frames in order to replace them when damage occurs thereto). It is noted that the recitation regarding the carriages being temporarily connected and detachable from the milking parlor frame upon arrival of the frame at a destination, as this is an intended use recitation and there is no structure disclosed in Ferris which would preclude the removal of the wheeled carriages upon arrival of the frame at a destination, the claim limitation is met. Further, Ferris does not teach the wheels being adjustably mounted so as to raise and lower with respect to the carriage body. Smith teaches within the analogous art of animal related trailers means for adjustably mounting the wheels (via hydraulic operation, column 4, lines 63-66) to raise and lower them with regards to the platform to reduce the climb for the animal to enter the trailer. Because these two structures for lowering and raising a platform to reduce the vertical distance required by the animal to enter the device were art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to substitute the hydraulic system taught by Smith for the jacking system disclosed by Ferris to reduce the amount of physical labor required by the operator.

Regarding claim 13, Ferris as modified discloses the invention as claimed with the exception of the use of steel T-beams. It would have been an obvious matter of design choice to design the frame base with T-beams since the applicant has not disclosed that the T-beams solves any stated problem or is for any particular purpose and it appears that the invention would perform equally well with the use of an I-beam or an L-beam. Further, Ferris as modified does not positively disclose the structure is made from steel. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use steel as a strong, cheap

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and cleanable material, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

Regarding claim 14, Ferris as modified discloses the use of holes in the frame base (60) with the exception of positively disclosing their positioning within the frame. It would have been obvious to one having ordinary skill in the art at the time the invention was made to place the holes in upright webs of the T-beams of the base, since it has been held that rearranging parts of an invention involves only routine skill in the art. As such, the frame may be connected to the wheeled carriage by the holes if so desired as it has been held that the recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations.

Regarding claim 15, Ferris as modified discloses the frame base including a front longitudinal member and a back longitudinal member that are parallel to each other and wherein a plurality of lateral members extend between and are attached to the front and back longitudinal members.

Regarding claim 17, Ferris as modified discloses groups of milk hoses, vacuum lines and control lines extending from each of the milking stations together to a longitudinal end of the milking parlor

Claims 16 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ferris as modified by Smith as applied to claim 12 above, and further in view of van der Lely, US Patent 6,044,793.

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Ferris as modified discloses the invention substantially as claimed including the structure containing all of the equipment needed for milking an animal. However, Ferris as modified does not disclose the milking station containing an automatic teat cup cluster detacher including a support arm for supporting a teat cup cluster. It would have been obvious to one having ordinary skill in the art to use an automatic teat cup cluster detacher with a support arm in conjunction with the milking parlor of Ferris as modified as it was known in the art at the time the invention was made to use an automated teat cup cluster as seen in van der Lely in conjunction with a milking parlor in order to milk a plurality of cows at one time.

(10) Response to Argument

The Examiner has adopted the subheading numbering of the Appellant for ease of reference.

B-1. Rejection of Claims 11-15 and 17 under 35 U.S.C. 103(a) based on Ferris in view of Smith.

It is maintained that all limitations from independent Claims 11 and 12 are taught or suggested by the combination of Ferris and Smith. It is again noted that the instant application was not examined in light of the invoking of 35 U.S.C. 112 6th paragraph and as such, the claims must be interpreted as broadly as their terms reasonably allow as per MPEP 2111.01.

With respect to the “Appellants stand by the remarks of record... {in} summary, Appellants’ position is that the axle of a semi-trailer is not a detachable carriage temporarily connect to the parlor frame, as the terms “carriage,” “detachable,” and “temporarily” are defined and used in the present application”, it is noted that the Appellant has only proffered arguments

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and has not provided any evidence to contradict the ability of the Ferris reference to function as stated by the Examiner. The claim limitation “carriage”, without invoking 35 USC 112, 6th paragraph in the interpretation of the term, is defined no more than a wheeled support carrying a burden. As such, one with ordinary skill in the art would clearly define the axle mechanism disclosed by Ferris as a carriage. With respect to the claim limitation “detachable”, it is again noted that the Appellant has not proffered any evidentiary support for the statement that the Ferris reference does not disclose the carriage being detachable from the milking parlor. The term detachable is simply something that is capable of being detached. The Appellant has admitted on the record, reference Appellant’s Remarks submitted 02/13/2006 at the paragraph bridging pages 7 and 8, that “most would not consider...an axle mechanism, to be detachable because **removing** them is expensive, takes great effort and is generally only attempted when repair is necessary.” As such, the Appellant’s have admitted on the record that axle mechanisms are capable of being removed and as such, the Ferris reference clearly discloses the limitation of being “detachable”. With respect to the claim limitation “temporarily”, the current invention is directed to an apparatus. As such, a snapshot of the claimed invention at one moment in time must be consistent with a snapshot of the claimed invention at a second moment in time. As such, the term “temporarily” does not define any structural limitation. Further, “temporarily” is basically defined as something for a limited time. The Appellant has not positively claimed any specific time limits or provided any defined frame of reference in which such a term would encompass and as such, any amount of time could be considered “temporarily” inclusive of, in the extreme example, the amount of time that it would require the axle mechanism to sit stationary and rust to the point of failure.

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Appellants have stated that they are not asking that limitations from the specification be read into the claims, however the Appellant repeatedly directs attention to the specification for the defining of the claim language. The Appellants have stated that the term “carriage” is described to have a body, swiveling caster type wheels, attached to a jack (paragraph [0023]). However, it is noted that the Appellants are not able to point to limitations within the claims themselves, to provide such a structure as no such limitations have been claimed. The Appellant further states, ““Temporarily connected” and “detachable” are used complementary with one another *and described how the carriages are used*” (emphasis added). It has been held that the recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

With respect to the Appellants arguments directed to detachable carriages are not equivalent to or suggested by semi-trailer axle mechanisms, it is again noted that an Attorney argument in a brief cannot take the place of evidence. *In re Pearson*, 494 F.2d 1399, 1405, 181 USPQ 641, 646 (CCPA 1974).

In response to the Appellant’s arguments that one of skill in the art would recognize “swiveling caster type wheels and a jack on a body to form a “carriage” is not similar to, nor an equivalent of, an axle on a semi-trailer”; although the elements of the caster type wheels and a jack are found as examples or embodiments in the specification, **they were not claimed explicitly**. Nor were the words that are used in the claims defined in the specification to require these limitations. A reading of the specification provides no evidence to indicate that these limitations must be imported into the claims to give meaning to disputed terms.

With respect to the Appellant's arguments regarding limitations directed to four or more carriages. This statement was errantly included in the discussion of the instant claims under prosecution. As the limitation regarding four or more carriages is not a limitation of the current claims under appeal, no further discussion is deemed necessary. It is however noted that, the Ferris reference does meet the claim limitation of *a plurality* of wheeled carriages as more than one wheeled carriage is disclosed in the Ferris reference. With respect to the Appellant's statement that Ferris teaches that the trailer includes a single wheeled axle for the trailer: it is clearly stated within the specification of Ferris at column 2, lines 32 that "the trailer is supported by wheels 17". As is seen in Figure 1 of Ferris, the side profile shows two wheels (17) thereby rendering obvious to one with skill in the art that Ferris also discloses a plurality of wheeled carriages. While it is noted that one set of wheels is attached to the milking parlor frame via a tractor, the claims as presented only require that the plurality of wheeled carriages be temporarily connected to the milking parlor frame and as such, the Ferris reference discloses the claimed limitation of a plurality of wheeled carriages.

With respect to the Appellant's arguments directed to the Smith reference in that "there simply is no teaching in Smith of wheeled carriages temporarily connected to a milking parlor frame, where each carriage is detachable from the milking parlor frame, as required by claims 11 and 12 as currently presented". Appellant is arguing against the Smith reference individually. The Smith reference was not relied upon for the wheeled carriages connected to the milking parlor frame or each carriage being detachable from the milking parlor frame. The Ferris reference clearly disclosed these claim limitations as was discussed above and as such, the

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Appellant's arguments regarding the Smith reference failing to provide features upon which it was not relied upon should not be found persuasive.

B-2. Response to Appellant's arguments that the suggestion to modify would render the Ferris and Smith devices to be unsuitable for their intended purpose.

It is once again noted that the Appellant is looking to the specification to define terminology in the claim language and that these limitations were not explicitly claimed in the claims themselves. The Appellant again provides spurious arguments stating that "To modify Ferris, as suggested by the Examiner, would require that the semi trailer axle of Ferris be detachably connected via hand turned bolts or clamps." The Ferris reference was not modified to provide for the feature of being detachably connected and it has been maintained that it is an obvious function of the Ferris device. This statement is agreed to by the Appellant as they explicitly state in the Appeal Brief that the "Appellants do not dispute that an axle *may* be removed from a trailer." The Appellant's appear to argue that capable of being removed is distinctly different from capable of being detached. However, the Appellant has not clearly stated what the distinction in such terminology is that would not lend one with skill in the art to associate being removable synonymously with being detachable.

With respect to the Appellant's arguments regarding the intended use of the Appellant's invention as detailed on page 17 of the Appeal Brief, these limitations are not claim limitations and therefore are not an appealable issue. However, it is pointed out that the Appellant's arguments regarding the intended use being for installation in a parlor building, in which a layer

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of concrete is poured over the frame, are directed to an invention which is not currently under prosecution.

B-3. Response to the Appellant's arguments that Ferris in view of Smith should be reversed because Ferris and Smith are directed to a non-analogous art.

With respect to the Appellant's arguments that the Ferris and Smith reference are directed to analogous art, this is respectfully disagreed with. As sated in MPEOP 2141.01(a), "In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of applicant's endeavor or, if not, the be reasonably pertinent to the particular problem with which the invention was concerned", further stating "A reference is reasonably pertinent if, even though it may be in a different field from that of the inventor's endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his problem." The Examiner maintains that the Ferris reference is within an analogous art of the Appellant's reference in that the Ferris reference is directed to an apparatus for moving an inclusive milking unit from one location to another location and the Appellant's invention is directed to an apparatus for moving an inclusive milking unit from one location to another location.

C-1. Response to Appellant's arguments regarding Ferris in view of Smith in view of van der Lely do not teach or suggestion at least one limitation of each of claims 16 and 18.

It is noted that the Appellant has not argued that the van der Lely reference does not teach that which it was relied upon to teach, i.e. a milking station containing an automatic teat cup

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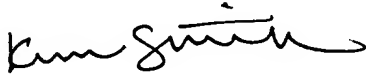
cluster detacher including a support arm for support a teat cup cluster. As such, the Appellant's arguments with respect to claims 16 and 18 should not found persuasive, as one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.


For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Kimberly S. Smith

Conferees:

Teri Luu 

Meredith Petravick 